(iv) levy a tax on all products sold within the state but exempt from such tax those products made by in-state manufacturers,[10] (v) provide a tax credit against a state sales tax on the sale of products produced in-state but not on the sale of out-of-state products,[11] and (vi) tax both in-state and out-of-state activities for the purpose of funding rebates or subsidies to the in-state actors.[12] Each of these discriminatory state taxes invalidated by this Court on dormant Commerce Clause grounds is fundamentally distinguishable from the Ohio investment tax credit at issue in this case.

For the company already located in Ohio, the choice is whether to expand or replace its facilities in Ohio or to locate the new investment in another state. If the new machinery and equipment will be used to expand production over and above existing capacity, then the decision to invest in Ohio would actually ***increase*** the company's Ohio tax liability to the extent the business activity facilitated by the new investment creates greater net worth or net income for the company, which increase will then typically be partially offset by the investment tax credit. On the other hand, if the Ohio company decided to locate the new property outside Ohio, once again the decision to expand the company's operations to another state furthers rather than hinders the interests of inter-state commerce. The Ohio company would now be transacting business in at least two states, and would ***apportion*** its franchise and income taxes between those states. O.R.C. § 5733.05(B)(2); *Harsco Corp. v. Tracy*, 85 Ohio St.3d 382, 383 (1999). Thus, by deciding to place the new machinery and equipment outside of Ohio, the Ohio company would be ***lowering*** its Ohio taxes. Furthermore, if the other state has a lower tax rate than Ohio for franchise and income taxes, the Ohio company's decision to locate the

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[10] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-73 (1984).

[11] *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).

[12] *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194-97 (1994).

new investment outside of Ohio would not only lower its Ohio taxes, it would also reduce the company's aggregate tax liability.

The Sixth Circuit's decision below rests on the false premise that the Ohio investment tax credit ineluctably places "golden handcuffs" on Ohio businesses, coercing them to remain shackled to Ohio and discriminating against interstate commerce through economic incentives too desirable to pass up. As the court of appeals erroneously presumed:

> the economic effect of the Ohio investment tax credit is to encourage further investment in-state ***at the expense of development in other states*** and . . . the result is to hinder free trade among the states.

Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 745 (6th Cir. 2004), (emphasis supplied). This conclusion is demonstrably false as a matter of logic, experience and economic theory. The Sixth Circuit's reasoning that to reward companies for investing in Ohio thereby discourages them from investing elsewhere is founded upon a false syllogism.

Moreover, since only one state would be able to tax a company's new investment of machinery and equipment in its franchise tax base if every state were to adopt the identical franchise tax and investment tax credit, the Ohio investment tax credit is "internally consistent."[13] Importantly, the fact that the reach of a state's regulatory powers and incentive policies properly ends at its own borders should not be confused with the repugnant idea of intrastate protectionism.

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[13] *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). In order to be internally consistent, a tax must not impose a greater burden on interstate commerce than on intrastate commerce if it were assumed to be imposed by every state. This test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* at 183.

The Ohio investment tax credit is not rendered unconstitutionally protectionist merely because it does not reward investments made outside of Ohio. Other states remain free to reward, ignore, or even penalize similar investment activity within their own borders.

It is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385 (1991). It is likewise explicitly clear that the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). As Justice Stevens observed, the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring).

The only type of investment tax credit that could violate the dormant commerce clause is one that discriminates against out-of-state activities or actors in favor of their in-state competitors. *See Bacchus*, 468 U.S. at 272 ("a State may not tax interstate transactions in order to favor local businesses over out-of-state businesses"). No such discrimination is posed by the Ohio investment tax credit, which taxes only intrastate transactions.

Declaring a statute unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Given the serious flaws in the economic analysis and constitutional reasoning of the decision below, this Court should reject the Sixth Circuit's significant encroach-

ment on "laudatory" state prerogatives to design their tax systems "to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp.*, 498 U.S. at 385. The Ohio investment tax credit properly fulfills that goal and should be upheld.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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FILED
JAN 2 3 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-1704 and 04-1724

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BRIEF OF *AMICI CURIAE* FISCAL POLICY INSTITUTE, CONNECTICUT VOICES FOR CHILDREN AND GOOD JOBS FIRST IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* FISCAL POLICY INSTITUTE, CONNECTICUT VOICES FOR CHILDREN AND GOOD JOBS FIRST IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

The Fiscal Policy Institute is a nonprofit, nonpartisan research and education organization with offices in Latham, New York and New York, New York. Since its establishment 13 years ago, the Fiscal Policy Institute (FPI) has

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[1] This brief is filed in accordance with the global consent letters filed by petitioners and respondents with this Court. Pursuant to Supreme Court Rule 37.6, the Fiscal Policy Institute, Connecticut Voices for Children and Good Jobs First state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

worked to increase public and governmental understanding of issues related to the fairness of New York's tax system and the stability and adequacy of state and local public services.

While the states "may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes" (*West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n. 15 (1994)), FPI is concerned that in recent decades the states have been increasingly competing for economic activity through the use of tax incentives and credits that discriminate against interstate commerce. From a public policy perspective, FPI is concerned that these discriminatory approaches divert resources from the types of state activities (such as "maintaining good roads, sound public education, or low taxes") that are permissible under the Commerce Clause and that are much more likely to result in increases in the overall amount of economic activity in the country.

FPI believes that the decision of the Sixth Circuit in this case, if upheld by the Supreme Court, would help to de-escalate the "economic war among the states" that is currently being played out in ways that are inconsistent with the Supreme Court's Commerce Clause jurisprudence.

Connecticut Voices for Children ("Voices") is a not-for-profit organization that seeks to promote the well-being of all of Connecticut's young people and their families by advocating for strategic public investments and prudent public policies. Voices advances its mission, among other ways, through high quality research and analysis.

For the last nine years, the work of Voices has included analyses of state fiscal policies, including how the state of Connecticut spends its money and how it raises its money. Voices is concerned that the state is not making the strategic investments in children and families—including education and health care—that are necessary for personal well-being as well as for Connecticut's economic future. At the same time, Voices

is aware of an increasing use of business tax expenditures that deprive the state of much-needed revenues, create an unbalanced playing field that favors large, multi-state and multinational corporations over local, small businesses (which, as a category, are the acknowledged drivers of our state economy), and which are enacted into law without adequate assessment of any immediate or ongoing benefits to the state.

Good Jobs First is a non-profit, non-partisan research and education organization based in Washington, D.C. with offices in New York, New York and Chicago, Illinois. Good Jobs First seeks to promote greater accountability in state and local economic development programs and deals by tracking the adoption of reforms such as deal-specific disclosure of costs and benefits, job quality standards (wage and healthcare requirements), clawbacks (recapture provisions for deals that fall short on jobs or other promised benefits), and budgeting reforms such as Unified Development Budgets (to encourage more awareness of costly but poorly understood tax incentive expenditures).

Good Jobs First has generated research reports and a book (*The Great American Jobs Scam: Corporate Tax Dodging and the Myth of Job Creation*) that conclude that state-enabled economic development subsidies like those at issue in *Cuno*—usually justified in the name of interstate competition for jobs and tax base—have so proliferated as to create many unintended consequences that are antithetical to the goals of authentic economic development and injurious to businesses that are not able to exploit the "economic war among the states." These include: less opportunity for low-income communities most in need of reinvestment; a regressive tax burden shift; a serious national infrastructure deficit; insufficient support for workforce development; and a decline in funding for public education.

SUMMARY OF ARGUMENT

1. There is a strong public policy rationale for recognizing respondents' standing to bring suit. In spite of the Commerce Clause, almost all states have enacted, as a key weapon in their economic competition, discriminatory tax legislation that provides in-state businesses a direct competitive advantage and burdens interstate commerce. Such legislation is rarely challenged, however, because, on the whole, the tax benefits derived by multi-state corporations from the proliferation of tax incentives far outweigh the costs of any discrimination those corporations may suffer in particular instances, and a challenge to a tax incentive denied by one state might put at risk the tax breaks received in other states. As a consequence, large multi-state corporations have a huge stake in maintaining the status quo. The primary victims of the proliferation of targeted business tax incentives are other taxpayers in the state and locality who face higher tax burdens and/or reduced government services. These victims should therefore have standing to challenge the constitutionality of state business tax incentives to protect their own, directly impacted economic interests, and in doing so, the interests of the national economy as well.

2. Ohio's investment tax credit discriminates on its face against out-of-state manufacturers subject to the State's corporate income tax. As a result of the credit, manufacturers with production facilities in Ohio face a lower effective tax rate under Ohio's corporate income tax than manufacturers whose manufacturing operations are outside the State, providing a direct commercial advantage to in-state manufacturers. This difference in tax burden is due solely to the difference in the situs of the taxpayers' production facilities. Such discrimination, apparent on the face of the statute, is virtually *per se* invalid under well-established Supreme Court Commerce Clause jurisprudence.

3. The structural framework of a state corporate income tax, including Ohio's, requires that the calculation of tax liability take into account a taxpayer's activities both within and outside the state. This calculation includes, for example, deductions for wages and other expenses incurred both within and outside the state, as well as allowable depreciation for property both within and outside the state. As a consequence, when these rules regarding deductible expenses and allowable depreciation make distinctions between in-state and out-of-state property, favoring the former over the latter, they violate the Commerce Clause. Similarly, Ohio may not provide an investment tax credit for in-state manufacturing property while providing no corresponding credit for out-of-state manufacturing property without running afoul of the Commerce Clause.

4. A ruling upholding the constitutionality of Ohio's investment tax credit would undoubtedly lead to an escalation by the states in the discriminatory tax treatment of out-of-state businesses.

5. The specific intent of the Commerce Clause is to preclude the states from engaging in exactly the kind of parochial, discriminatory economic policies exemplified by Ohio's investment tax credit, which undermine the goal of a national common market. While the precise reach of the Commerce Clause is a subject of debate, the authority and responsibility of the Court to strike down discriminatory state tax schemes designed to favor in-state activity is beyond question.

6. The public welfare would be better served by the prohibition of the use of discriminatory business tax incentives than by their continued proliferation. Targeted business tax incentives are largely ineffective as a policy tool; their widespread use instead reflects such factors as political expediency, the political power and influence of large corporations, and purposeful discrimination in favor of in-state